SPEECH

OF

MR. BARNARD, OF NEW YORK,

IN RELATION TO

THE DESTRUCTION OF THE "CAROLINE,"

AND

THE CASE OF McLEOD.

Delivered in the House of Representatives, August 31, 1841.

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SPEECH.

THE AFFAIR OF THE CAROLINE AND THE McLEOD CASE.

IN THE HOUSE OF REPRESENTATIVES, AUGUST 31, 1841.

The House having under consideration a resolution calling on the President for information, &c.—

Mr. BARNARD rose, and addressed the House as follows:

Mr. SPEAKER: I shall speak to the particular merits of the resolution on your table as little, probably, as any member who has preceded me in this debate. In truth, sir, it must be apparent to all that this resolution was introduced, originally, chiefly with a view to make it the occasion, not the subject of a debate; at any rate, such has been the result.

The positions which had been taken by the Secretary of State, Mr. Webster, in his correspondence with Mr. Fox, the British Minister, residing at Washington, in relation to the destruction of the "Caroline," and the case of McLeod, were assailed at a very early day in the present session. The war was begun in the Senate, and it had no sooner ended there than it was revived and prosecuted with new vigor in this Hall. Sir, since the last voice was heard on this floor, in tones of condemnation towards the Secretary, we have had an authoritative opinion pronounced on the same subject by the Judges of the Supreme Court of the State of New York; and it must be confessed that that opinion goes the full length of affirming and defending the strongest and most extreme positions which any party man, in either end of this Capitol, however violent and ultra, had seen fit to take upon the subject. What I propose, at the present time, is, to enter on a brief analysis and examination of this opinion of the learned judges of my State, in order that I may see for myself, and that the House may see, how much deference it is really entitled to. Before entering on this task, however, I must beg leave, by way of preparation for the proper apprehension of the case we have in hand, to submit to the House a succinct statement and recital of facts.

It was in the night of the 29th of December, 1837, that an American vessel—a steamboat called the "Caroline"—with an American crew, and other American citizens on board, lying in American waters—being moored to the dock at Schlosser, on the Niagara river, in the State of New York—was suddenly attacked by a body of armed men from the Canada shore, who, with the weapons and in the manner of war, carried the vessel by boarding, killing some and wounding others; and then, cutting her loose from her moorings and hauling her into the stream, and setting her on fire, sent her off, with whatever and whoever remained on board, and in whatever condition, to an appalling fate down the cataract of the Niagara.

Now, sir, in the face of this transaction, without further explanation, all will agree, as all did agree at the time, that here had been committed an outrage for which the Imperial Government of Great Britain must answer—an outrage which must either be justified by some strong and overwhelming necessity, or for which the most ample reparatiou must be made, or which must be redressed by war. The case was clearly one upon which an issue of peace or war was to be made up between the two Powers; and this was an issue which was to be determined

between the two Governments, in the first instance, in the usual form of negotiation—a matter, of course, appertaining wholly and exclusively, on our part, to the President of the United States, as the Chief Executive Magistrate of the nation, aided by the appropriate functionaries. Such negotiation would have for its object (supposing justification, as was and is still believed, wholly out of the question) either to obtain complete reparation for this national insult and injury—preserving at the same time an honorable peace—or to place on record, and before the world, a full and complete justification for a necessary and unavoidable war.

The first thing incumbent on the President of the United States to do was to arm himself with the facts in the case, and, upon those facts, to determine, for himself and for the whole country, on the precise nature and character of the transaction. Accordingly, we find Mr. Forsyth, the Secretary of State, under the direction of the President, within one week after this astounding event had transpired, namely, on the 5th day of January, 1838, submitting to the British Minister, Mr. Fox, certain papers and documents in relation to this extraordinary outrage, and asking that Minister to furnish in return any facts or explanations which he might receive from the provincial authorities of Upper Canada. In the same communication, Mr. Fox was informed that this matter "would necessarily form the subject of a demand for redress on the British Government." On the 6th of February, 1838, Mr. Fox submits to Mr. Forsyth a letter which he had received from Sir Francis Head, the Governor of Upper Canada, together with other official and legal papers relating to the destruction of the "Caroline."

Now, the facts disclosed in all these papers and documents, when summed up, were chiefly these: That a considerable force of armed men had taken military possession of Navy Island, on the Canada side of the Niagara river, with the professed and avowed purpose of effecting a revolution in Upper Canada, and wresting that province from the dominion of the British Crown; that Governor Head had placed a large military force on that frontier, under the immediate command of Colonel McNab, an officer in regular commission in her Britannic Majesty's provincial militia, who was instructed to act on the defensive against the revolutionizers of Navy Island, and, particularly, to do no act "which the American Government could justly complain of as a breach of neutrality;" that the expedition for the destruction of the "Caroline" was ordered by Colonel McNab as a defensive act, deemed by him indispensable, and expressly on the ground that that vessel "was identified with the force which had invaded Upper Canada;" that the enterprise was under the immediate command of Captain Drew, bearing her Majesty's commission as a commander in her Majesty's Navy, aided by two other commissioned officers of the Royal Navy, one a captain and the other a lieutenant, and having an armed force of forty men; and, finally, that, in attacking, boarding, and cutting out and destroying the "Caroline," the whole was done by force of arms, with military array, and in the manner of war, the attacking party having, according to the official report of Captain Drew, suffered severely in the conflict.

With these facts before him, the President of the United States, as was his duty, made up his solemn decision and determination, for himself and for the whole country, in regard to the nature and character of this transaction. What that decision and determination were may be fully seen by reference to the letter of Mr. Stevenson, our Minister to England, of the 22d of May, 1838, to Lord Palmerston, in which, under the express instructions of the President, he makes a representation of this outrage to the British Government, with a demand for redress. A single sentence from this despatch of Mr. Stevenson will show what the nature and character of the transaction were, as it had been determined by the President. It was charged by the American Minister as "*an invasion of the territory and sovereignty of an independent nation, by the armed forces of a friendly Power.*"

To examine the position here taken with a little particularity. The act com-

plained of was "an invasion;" not a mere trespass on private property, such as individuals might commit, but an act appropriate to war, and such as one nation commits against another nation. It was an invasion "of the territory and sovereignty of an independent nation;" not a mere intrusion into some man's private premises or close, nor even a mere invasion of the soil or sovereignty of New York; it was the territory and sovereignty of the *American nation;* it was the right of eminent domain; it was the supreme power and authority in the country; it was the peaceable dominion of the laws; it was national equality and independence: it was these that had been forcibly interrupted and violated. And then, the act was done with the aid of "armed forces;" it was not a mob, this invading party; not a company of rioters; not a band of marauders and robbers; but it was an organized military force, such as pertains to Governments and nations. And, finally, here was a military and hostile invasion of the country by "a friendly Power;" so that the aggression was aggravated by the fact that it was committed against the faith, and in the face of a treaty of amity and peace actually existing between the two countries.

Such, then, were the nature and character of this transaction, and such were the position and attitude of the President and of the country in regard to it; and now it is material to observe that, from that period down to the present hour, this position and this attitude have never been relinquished or changed by the Government in the slightest manner or degree. They were taken under the Presidency of Mr. Van Buren, and when Mr. Forsyth was Secretary of State, and they have been maintained under those who have succeeded to their places.

It is singular, certainly, that, to the present hour, no answer has ever been given to the demand made on the British Government for redress, through Mr. Stevenson; though it is certainly true, at the same time, that the demand has never been withdrawn. The documents in the case show that Mr. Stevenson was informed, in September, 1839, by Mr. Forsyth, that the President expected, from some information he had then lately received, that "the British Government would answer the application in the case without much further delay."

But though no answer has been received to the demand for redress, yet a correspondence has taken place on the subject between the British Minister at Washington and the Secretary of State. This was occasioned by the arrest of one Alexander McLeod in the county of Niagara, in New York, charged with having been one of the party or military force engaged in the destruction of the Caroline. His arrest took place in November, 1840. He was afterwards indicted for murder for his participation in that outrage, and particularly on account of the death of a poor creature named Durfee, belonging to the steamboat, who had been found dead on the dock the morning after the attack; and he was held in close confinement in the jail at Lockport to await his trial on that charge.

In December, 1840, the correspondence referred to took place. Mr. Fox presented the case of McLeod to the Government, and requested its interference to procure his release, avowing, as the ground of this request, that "the destruction of the Caroline *was* a public act of persons in her Majesty's service, obeying the orders of their superior authorities." This avowal, it will be observed, was in strict accordance and agreement with the position which had been assumed by our Government, and which had been presented to Great Britain. Mr. Forsyth so considers it in his reply, informing the British Minister that this was the first time the admission had been made by any one having authority to make it, and reminding him that no answer had yet been given to the demand which had been presented, upon this very ground, to his Government for redress. In regard to McLeod, he informs Mr. Fox, in substance, that he is in the hands of the law, and the court will decide on the validity of the defence which the Minister sets up for him when legally established before it.

In March, 1841, Mr. Fox renewed his correspondence on this subject with the

Secretary of State. He informs the Secretary that his Government had approved of the course pursued by him in his letters, and of the language he had employed; and that he was now instructed to demand formally the immediate release of McLeod. He then proceeds to set forth again the precise grounds on which this demand was made, which is done in these words: "That the transaction on account of which McLeod has been arrested, and is to be put upon his trial, was a transaction of a public character, planned and executed by persons duly empowered by her Majesty's colonial authorities to take any steps and to do any acts which might be necessary for the defence of her Majesty's territories, and for the protection of her Majesty's subjects." "The transaction was a justifiable employment of force for the purpose of defending the British territory from an unprovoked attack," &c.

Under date of the 24th of April, 1841, the letter of Mr. Webster, the present Secretary of State, in reply to Mr. Fox, was written, and a noble letter it is. "The fact," says Mr. Webster, "that the destruction of the Caroline was an act of public force by the British authorities being formally communicated to the Government of the United States by Mr. Fox's note, the case assumes a decided aspect." "The undersigned," he says, "has now to signify to Mr. Fox that the Government of the United States has not changed the opinion which it has heretofore expressed to her Majesty's Government of the character of the act of destroying the Caroline." There was no difference of opinion between the two Governments in regard to the character of that act; just as it had been charged on one side, it had now been admitted and avowed on the other. And Mr. Webster proceeds to remind the British Minister that it still remains for his Government to show how this outrage was to be defended; and, in a few words, put together in his own significant and inimitable way, he warns the Minister and his Government of the difficult task which those will have who shall undertake that defence and justification.

In regard to McLeod, Mr. Webster informs Mr. Fox, in substance, as he had been informed before by Mr. Forsyth, that McLeod was in the hands of the law, and could be released only "by such proceedings as are usual and are suitable to the case." He makes, however, at the same time, the manly and explicit declaration, that "the American People, not distrustful of their ability to redress public wrongs by public means, cannot desire the punishment of individuals when the act complained of is declared to have been an act of the Government itself." And Mr. Fox is informed that the American Government, entertaining no doubt that, under the circumstances of the case, individuals concerned in the transaction referred to ought not to be holden personally responsible in the ordinary tribunals of law, had decided to take such measures in regard to McLeod as the occasion and its own duty appeared to require.

As is well known, the President sent the highest law officer of the Government, the Attorney General, into the State of New York to confer with the public authorities there, and to furnish to them and to the courts the authentic evidence, from the records and archives of the Government, relative to the affair of the Caroline. And it is this act that has been so much complained of in debate here, and in New York.

Sir, I hold it to have been the bounden and indispensable duty of this Government to have done at least as much as was done in this case. Let it be remembered that the character of the transaction out of which the arrest of McLeod had arisen had already, and at an early day, been determined by the President; that a representation had accordingly been made to the British Government, and a response had been received, containing an explicit acknowledgment that the transaction had been *truly* characterized and determined by the President. Let it be remembered, also, that this determination, on the part of the President, settled precisely, for the whole country, the particular relation in which Great Brit-

ain, a foreign nation, had stood to this nation in that particular transaction, and whether it was a relation of war or of peace—a determination which belonged exclusively to the Executive of the nation to make, and which, as I shall have occasion to show more fully before I close my remarks, when made, was conclusive on all courts, and all persons and parties throughout the country. But all the authentic proof of the facts here adverted to—of the actual character of the transaction, and the decision of the Executive that, in this transaction, the British authorities had placed themselves in an attitude and relation of hostility and war towards the United States—the authentic proof of all this remained with the Executive, among the archives of the Government, secret, except so far as he might see fit to disclose them ; and I should be glad to know what could have been more appropriate, bound, as I contend he was, to furnish to the authorities and the courts of New York the facts necessary to the proper understanding of the affair of the Caroline, than that he should send to that State the proper law officer of the Government, with the papers and documents which contained the only authentic proofs applicable to the case ? Sir, I am sorry that any body connected with the public authorities of New York should have thought it incumbent on them to complain of this act, as an interference in the affairs or with the courts of justice of that State. I remember an occurrence, not unconnected with McLeod, which it would have been much more creditable to have complained of, as an unjustifiable interference with the courts and the administration of the law, and, indeed, to have noticed in some efficient way—I allude to the disgraceful spectacle of an excited populace, gathered before or about the court-house and jail at Lockport, where McLeod had been confined, and which, by menaces, and a show of arms and force, compelled a judicial functionary, who, in the exercise of his own lawful authority, had decided and decreed, upon grounds satisfactory to himself, that McLeod should be let to bail, to reverse the judgment he had pronounced, and give back McLeod again to the restraint of his prison and his cell. If any loud complaint of this transaction was ever made in the quarters where it should have been complained of, it wholly escaped my hearing or observation. I do not remember that any large rewards were ever offered for the detection of the leaders in that outrage, or that any special orders were ever given to the officers of justice to aid in bringing the actors concerned in it, or any of them, to condign punishment. Sir, I speak of this affair, so disgraceful, not to New York only, but to the whole country, with the more freedom, as I do with the more regret, because it *is* New York that is more immediately concerned, and because the administration of that State is in the hands of those to whom I am both personally and politically attached. Within my recollection, this is the first, and I trust in God it will be the last instance, occurring in that noble State of a direct popular interference with the administration of justice in the criminal courts.

Mr. Speaker, having presented you with a brief recital of the leading facts in relation to the destruction of the Caroline—having shown what that transaction was, as characterized and determined by the President, and what the steady and unwavering course of this Government has been on the subject, in whose hands soever the Government has been, I come now to consider the opinion of the judges of the Supreme Court of New York in the case of McLeod, to which I have before referred. I desire to treat this opinion with perfect respect, not only on account of the personal regard which I have for the learned gentlemen who compose that tribunal, but because of the profound veneration which I feel for the sacred office which they fill. I must take occasion to remark, however, that this opinion, in all that part of it which I shall now examine, was and is wholly extrajudicial, and I shall consider it, therefore, as the opinion of three gentlemen of high standing and respectability, and entitled to just so much weight as its own merits might give it, supposing it to have been delivered by them, in debate, on this floor, standing where, from their well-known political associations, they would have

stood, if here—in the ranks of the Opposition. The case of McLeod was brought before the court on *habeas corpus*, he being under indictment for murder; and his discharge was asked for by his counsel on the ground, substantially, of the facts as I have had occasion here to relate them. The court decided, in the first place, that the law would not allow them to discharge the prisoner on this process, *after indictment*, without a trial, supposing and admitting the defence, on the facts presented, to be perfect and conclusive; he must be delivered at the hands of a jury. So far, the decision was judicial, and it covered the whole case before them. When they had found this conclusion, there was nothing left for them to do, because it could not affect their adjudication in the case, in the least degree, to consider and decide whether the defence set up would or would not avail the prisoner on his trial before a jury. Yet they went on to consider and decide this very question—a proceeding wholly extrajudicial, and, in my opinion, flagrantly improper, since it was anticipating and forestalling a judicial proceeding and judgment which they might be called on to entertain and pronounce in this very case, after trial before a jury.

In this opinion, drawn up by Mr. Justice Cowen, one thing is very clear and certain, and that is the conclusion to which he comes; and he seems to me to get out with the same conclusion, that McLeod, for the part he took in the destruction of the Caroline, was a felon and a murderer. But it must be confessed that the reasoning by which this result is arrived at, probably on account of its extreme subtlety, is a little difficult to follow or to detect. A weighty opinion it certainly is, since it is made to press upon the subject under a superincumbent mass of ponderous legal authorities, which are piled up and heaped together, with how much regard to method or to meaning, I shall leave others to determine. By comparing this with some arguments which had preceded it, on the same side, especially some which had been presented in the other end of this capitol, and with which it affords some instances of remarkable coincidence, the general strain and course of thought may, I think, be discerned. The learned judge has put the argument into a legal form, and built it up in a lawyer-like way, upon a show of authorities. Well, sir, I shall undertake to meet the argument without any authorities: I will not quote one, except, perhaps, a single authority to a single point, and that an authority quoted and misapplied by himself. I shall undertake to present the case, I say, without authorities; but I think I may safely challenge all the lawyers and all the judges in Christendom to produce one reputable authority against the plain, practical positions which I shall lay down as governing the case.

In order, Mr. Speaker, that the House may understand the reasoning of the learned judge in this case, I will undertake to present it, in a brief form, and according to the best analysis that I have been able to make of it. I believe this analysis will present his argument with perfect fairness, as well as I can understand it.

In the first place, then, the judge finds a party, composed of a number of persons, treading on ground which, it is acknowledged, does not belong to them. *Prima facie*, they are unlawfully there; and this is therefore, in law, a trespass—it is trespass *quase clausum fregit*. He finds, also, a violence committed, and a homicide, by this party; and this, of course, is an assault and battery, and a murder. And this is the prosecutor's case. And how stands the defence? Why, the judge finds that the prisoner says, by his counsel, that this was not a trespass, but an invasion in lawful war, and the homicide was not a murder, but a killing in battle; and here his honor, the judge, lays out all his strength in the critical examination and repudiation of this defence. I give his argument as well as I can comprehend it.

Two things are necessary to make out this defence: first, that war actually existed; and next, that it was a lawful war. Now, only two suppositions can be in-

dulged in regard to the existence of war at all: one is, that war existed between Great Britain and the United States; the other is, that war existed between Upper Canada and the revolutionizers of Navy Island.

The first supposition is easily disposed of. No war existed between the United States and Great Britain; *because*, first, no war had been declared by Congress, which alone is the war-making power in this country; secondly, no war had been declared by the British Queen, who alone had the war-making power for Great Britain; and, finally, the provincial authorities of Upper Canada had not the power to declare or make war on the United States. All this is plain as the way to church.

The remaining supposition, then, is, that war existed between the revolutionizers of Navy Island and Upper Canada—what is called in the Books a "mixed" war—so called, to distinguish it from a "public" war, because one of the parties to it, as in all cases of a civil or revolutionary conflict of arms, though organized for war, is not yet organized or recognised as a nation. Admitting, for the sake of the argument, that such a war existed, and that it was a lawful war in Canada—that is, one to which the rights and the laws of war attached—yet, the moment it was transferred to our shores, it was unlawful; and there was wanting, therefore, one of the indispensable requisites to give validity to the defence set up for McLeod.

The learned judge goes on to make out this want of lawfulness, by a very particular examination of the various grounds on which the case had been or could be placed.

First, nothing is clearer, he insists, than that belligerants cannot follow one another into neutral ground, and there do battle. It is unlawful to do so; it is expressly forbidden by the Code of Nations; and he quotes largely from authorities to fortify this position, as if they had any thing to do with the case!

Then, it is equally clear, in his judgment, that this pursuit by the provincial powers, of their enemy on to our territory, could not be justified on any pretended necessity of self-defence; because, by recurring to the plain principles of the common law, as applicable to cases of assault, a homicide can only be excused when the party assailed has retreated to the wall, and turned then upon his adversary; in short, he must retreat as far as he can, and not, as in this case, actually seek an opportunity to pursue his enemy!

And, finally, it is clear also, that a subsequent approval of the act by the Imperial Government could not make that lawful which was unlawful before; no, not even if a special act of Parliament had been passed to that effect! That Government might thus make itself a party to the crime, but could not legalize the act in those who committed it.

And thus the learned judge disposes of the whole case—with many more words, certainly, but with no more arguments than I have here presented. He does go, however, one step further, and, as the case is somewhat remarkable, and seems to require to be characterized and explained, in some way, beyond any explanation or inference to be derived from the argument, he proceeds to give his conclusion on the whole matter. What think you, Mr. Speaker, was this transaction according to his construction of it? Hear him: "The result is, that the fitting out of the expedition was an unwarrantable act of jurisdiction exercised by the provincial Government of Canada over our citizens." There! there is the affair of the Caroline! The civil magistracy of Upper Canada exceeded their municipal jurisdiction in seeking *their* criminals, to do execution upon them, on our shores. Hear him: "Those authorities, being convinced of her delinquency, [the Caroline,] *sentenced her to be burned!* an act which all concerned knew would seriously endanger the lives of our citizens. The sentence, therefore, was equivalent to *a judgment of death!* and a body of soldiers were sent to do the office of executioners." There! there is the gospel of the affair of the Caroline, according to Mr. Justice Cowen!

The magistrates of Upper Canada exceeded their jurisdiction, by sending a *posse comitatus*—where was the sheriff?—to seize or destroy certain offenders against their municipal laws, beyond the territorial limits of the province! Sir, sir, if this were not too grave a subject, I would just propose to the whole House that we should now indulge ourselves in one universal, broad laugh, at the utter ludicrousness of these notions, and I do not think there is a man on this floor, of all who are now honoring me with their attention, of any party, who could refuse to join in it. But it is too grave and serious a matter to be disposed of in that way.

Mr. Speaker, we have seen already, in the recital I made at the commencement of my remarks, what this transaction in fact was. It is just as easy to understand the law of the case as it is to understand the facts.

I begin with laying down certain positions and principles, which are too plain to need the support of any authorities.

First, then, to make a war lawful, it is not necessary that it be preceded by a declaration, or by any notice whatever, from the party commencing it; and this rule applies to every kind of war, whether it be *solemn* war, or an *insolemn* war, as in the case of reprisals and the like, or a *mixed* war, or a *single act* of war.

Again: There may be, and there often are, individual or single acts of war, to which all the laws and rights of war, as between the parties or actors, attach, when there is no *state* of war, but on the contrary a *state* of peace between the Powers concerned; such peace, however, being broken or interrupted in such cases just for the time, and to the extent of the hostile acts.

Again: In order to make war, or any act of war, lawful, it is not requisite that it should be, at least in the estimation of any body except the parties undertaking it, either necessary or just. Every civilized and independent People determines for itself whether war, or an act of war, be just and necessary; and that determination is conclusive on all the world in regard to the *lawfulness* of the war, or the act of war. This rule applies to a warlike act, done on the plea of a necessary self-defence, as well as any other.

Again: The power to make war may be given, and often is given, by a Government, to a distant province. It has been given by England even to a commercial corporation, as to the East India Company, and that not only for defence, but even for aggression and for conquest. And in order to make a war undertaken by such province a lawful war, it is not necessary that the express warrant or authority for it should be shown; it is enough, and it is conclusive on all foreign parties concerned, that the Imperial Government admits and avows that the authority for the war, or the particular act of hostility, existed. The authority may not exist in any charter, or in any special instructions, but may result from the general relation between the Imperial Government and the province, and the general duties arising from that relation; and this is a matter to be judged of exclusively by such Government. In the case before us, the Canadian authorities had power to make war, in defence of the territory and citizens of her Britannic Majesty, in that province—a power claimed and exercised by them, and conceded and approved by her Majesty's Government at home, which is, in itself, conclusive on us, and on all foreign nations, in regard to the *lawfulness* of the war. It must not be forgotten, all the while, that, whether this war was just or necessary, and can be defended, especially in the particular act which is the subject of this debate, is another and a totally different question. All that is meant, when I speak of a *lawful* war, or act of war, is, that it is such a war or act as that the laws of war and the rights of war attach to it, covering with perfect immunity, for example, the incident of killing in military assaults and in battle.

Now, Mr. Speaker, I beg leave to recur to the fact, heretofore stated, that, at the period of the destruction of the Caroline, a war actually existed between Upper Canada, on one side, and the force assembled on Navy Island, on the other; that war having for its object, on the part of the Navy Islanders, nothing less than

the wresting of the province of Upper Canada from the possession and dominion of the British Crown. It was in the prosecution of that war that the transaction we are considering took place—a transaction which we all believe, and which we have pronounced, to have been unnecessary, unjust, and outrageous.

It was undertaken, however, as we have seen, on the alleged ground that the Caroline "was identified with the forces which had invaded Upper Canada," and her destruction, therefore, had become necessary, in the judgment of the provincial authorities, as an act of self-defence; so necessary that, in the judgment of the same authorities, she might be attacked and destroyed in American waters, without subjecting them to the charge of doing an act "which the American Government could justly complain of as a breach of neutrality."

The case thus presented, when we are looking at it in regard to the question of the personal responsibility of McLeod, may be considered in either one of two aspects. In the first place, the provincial authorities may have regarded the Caroline as "identified with the force which had invaded Upper Canada," by holding her to have actually *belonged* to that force, and have made a *part* of it. In this aspect, it would present the case of one belligerant pursuing another into a neutral territory, and there giving him battle. This, says the learned judge-whose argument I am reviewing, was unlawful; such a thing is expressly forbidden by the law of nations. No doubt of it, Mr. Speaker, in the world. But how, and towards whom, is such an act unlawful? Why, towards the neutral nation, undoubtedly, it is not only unlawful but an outrage—so unlawful is it, that the neutral nation may at once fly to arms, give battle to both parties, and drive them, if it can, by force of arms from its territory. But does the judge here mean to say, that every battle that has ever taken place between hostile armies, over and across the line from the territory of either, and on neutral ground, was not a battle but a mere trespass and assault, in which every death was a murder, punishable in the municipal courts of the neutral country! Yes, sir, this is his position; since I understand him to insist that the death of Durfee, though happening as the consequence of the midnight military attack, made by the authorities of Upper Canada on the Caroline—made, in the case here supposed, by one belligerent on another—was a murder, because the attack took place in the territory of a neutral Power. Admitting that the attack, if it had been made at Navy Island, would have been an act of lawful war, yet, made at the American shore, it was unlawful, *even as between the parties*, and every death was a murder!

Sir, it was about the year 1790, I think, that Admiral Boscawen attacked and destroyed a French fleet on the coast, and so near the shore as to be deemed within the waters of Portugal. The British Government sent a special and solemn embassy to the Court of Portugal to apologise for this breach of neutrality, which was satisfactory; and, I believe, the world would have heard with amazement that the Government of Portugal proposed to hold the parties to that affair individually responsible in her municipal tribunals, as for murder, for every death that had happened in that sanguinary conflict.

But, Mr. Speaker, the true history of this case, considered in reference to the personal responsibility of McLeod and others who may have been actors in it, may be read in another aspect of it. If the Caroline was identified at all with the force which had invaded Upper Canada, it must have been as being engaged, while owned and manned by American citizens who were not a part of the invading force, in aiding and abetting the designs and operations of the Navy Islanders, by affording facilities for supplying them with men and munitions of war. The pretence is, that the destruction of this boat became indispensable, and was undertaken as a necessary act of self-defence; or, to use Mr. Fox's language, an act "necessary for the defence of her Majesty's territory, and the protection of her Majesty's subjects." In this aspect, the act was an act of war, committed within the territory and upon the citizens of the United States. The authorities of Ca-

nada determined, as the Imperial Government declares they had a right to determine, and were right *in* determining, that it had become necessary for them to defend the province, not only against the force on Navy Island, but against citizens of the United States on the American shore, who, as they thought, or pretended to think, had identified themselves with that revolutionary force; that it was necessary, in short, to carry the defensive war in which they were engaged into the United States.

On every account, therefore, unnecessary, unjustifiable, and outrageous as we hold, and think we know, this act of war to have been, yet we have no warrant or authority to dispute its *lawfulness*—we have no warrant or authority to say that the laws and rights of war did not attach to it, as far as the parties engaged in it were concerned. It was undertaken on authority, the sufficiency of which we are not at liberty to question; it was planned and executed by officers bearing regular commissions and the flag of their country, and was conducted in the manner of lawful though of ferocious war, prosecuted in the name and for the behoof of their sovereign. It needed no subsequent approval or avowal on the part of that sovereign to give it the chracter of lawfulness; nor is its character of lawfulness affected in any manner by the consideration of what our opinion may be, or what the facts may show the world, in regard to the question whether it may or may not be defended and justified as a necessary act of self-defence.

But the learned judge, with whose argument I am dealing, still and strongly insists that there can be no such thing as lawful war, or a lawful act of war, in a *state* of peace. Well, sir, on this point I shall content myself with referring, briefly, to a few cases, which seem to me to be very much in point, and which I shall leave him, and others who think with him, to digest as well as they can.

In 1771, a Spanish commodore, with four or five frigates under his command, made a military attack on Falkland's island, then in the peaceable possession of the English, with whom the Spanish nation were at peace, and compelled a surrender to the arms of his master. His Catholic Majesty disavowed the act of his officer, and offered every equitable satisfaction; but it was never heard of, I believe, that the commodore, or any body under him, was held to be amenable to the municipal laws of England, as for trespass and murder.

A similar occurrence took place in 1789, between the same parties, in regard to an English settlement at Nootka Sound, and with very similar results in al l respects.

And we are not without some cases which touch ourselves much more nearly. What was the attack of the Leopard on the American frigate Chesapeake? The two countries were at peace; was or was not this an act of war? No war had been declared by either party; and certainly the British commander had no authority to make war. But he bore the commission and flag of his sovereign, and under these, and in the name of his sovereign, he poured a broadside into an American man-of-war; was it an act of war, or was it not? and, if not, what was it? It was done without sufficient warrant; was disavowed by his sovereign, who, by way of reparation, made provision for the families of those who were killed by the murderous fire of his artillery; but no body ever dreamed of holding the commander of the Leopard, much less one of his sailors, responsible to our municipal tribunals as for a murder committed on the high seas.

To allude to only one case more. In 1818, we were engaged in a war with the Seminoles, the conduct of which was committed to General Jackson, with instructions which forbid his entering Florida, then a province of Spain, with whom we were at peace, *except in close pursuit of his enemy;* and, in that case, to *respect the Spanish authority wherever it was maintained.* General Jackson entered Florida, not in pursuit of his enemy, the Seminoles, but to take forcible and military possession of the forts of St. Mark and Pensacola, then under Spanish authority, which he accomplished. This was done, of course, as an act of hostility

and war against the Spanish possessions in Florida; and, though the forts were ordered to be immediately restored, these acts were deemed by the Government not unjustifiable, on the ground of the protection, if not aid, which the Seminoles were accustomed to find at the hands of the Spanish authorities. Pray, Mr. Justice Cowen, was this an act of war or of peace? And do you hold that every violent death which may have occurred in this expedition was a murder, for which not only the old hero, but the meanest soldier in his army, might have been, and ought to have been, tried and hanged, under the municipal laws of Spain?

But let me make a supposition or two, in regard to this very affair of the hostile attack we are now considering. Suppose, for example, that some brigadier or colonel of militia, having got wind of the meditated attack on the Caroline, had suddenly assembled a force of a hundred men, and, in concert with the crew, had been prepared to receive Captain Drew and give him battle, and that then, instead of one or two, half a hundred had fallen in the engagement, what would Mr. Justice Cowen think of the case then?

Or suppose that Colonel McNab, instead of the Caroline, had thought it a necessary act of self-defence to attack and destroy the city of Buffalo, on the alleged ground that that city was engaged in aiding the revolutionizers of Navy Island with supplies of men, provisions, and munitions of war; and for this purpose he had come over himself to a midnight attack in command of a thousand men: Or suppose, in his zeal to serve his Queen, he had projected another Concord affair, and had sent a heavy force to march to Batavia, forty miles in the interior, to destroy the arsenal and military stores at that place, on the ground that that arsenal had supplied, and would supply, such stores to the forces on Navy Island: Will any gentleman here undertake to distinguish, in principle, between the cases I have here supposed, and the case of the attack on the Caroline as it actually occurred? No, no; they are cases of more breadth and magnitude, and there might have been a greater destruction of property and of life, but the character of the transaction would have been the same. It is only enlarging a little the scale of the map, that we may see more distinctly the character and features of the country we are exploring.

Mr. Speaker, quitting now the ground I have occupied thus far, I must take the liberty to suggest another position, which I assume in this case, and to which I have already alluded, in reference to the duty of the courts in New York, in regard to McLeod. The time that remains to me will allow me to do little more than make the suggestion.

I have before referred to the distinct fact that, in an early stage of this business, the President—the Executive of the Federal Government—took upon himself to determine the character of the transaction by which the Caroline was destroyed, and that that decision had never been changed. By determining that this was an act of war, directed against the United States, it resulted that, *quoad hoc*, the relation between the United States and Great Britain was a relation of war, and not of peace. This, then, was, in substance and effect, the decision in the case—a decision which it was the province of the Executive to make, and which, once made, was binding and conclusive on all persons and parties who might be affected by it, and on every court in the country.

On this point it is that I quote a single authority. It had been determined by Executive authority in England that a certain port in St. Domingo, at a certain period, (about the year 1807,) was no longer in possession or under the dominion of France. A question in relation to trading at this port arose in the courts, and it was in reference to that question that Lord Ellenborough said,* "It belongs to the Government of the country to determine in what relation of peace or war any other country stands towards this; and it would be unsafe for courts of justice to

* 15, East R. p. 90.

take upon them, without that authority, to decide upon these relations. But when the Crown has decided upon the relation of peace or war in which another country stands to this, there is an end of the question; and, in the absence of any express promulgation of the will of the sovereign in that respect, it may be collected from other acts of the State." "The courts *cannot* decide adversely to the declaration of the sovereign upon that point."

Mr. Speaker, I shall not pursue the case further. I do not in this place, whatever I might do elsewhere, impeach the opinion of the Supreme Court of my State, so far as that opinion was judicial in its character. The court decided that they could not legally discharge McLeod on *habeas corpus*. Very well; I regret that the judges did not stop there. But, with the whole of the facts before them, with facts to show what the character of the transaction in the destruction of the Caroline was, and what the Government of the United States had decided and declared it to have been, and though there was no longer any matter or parties before them, upon which, or between whom, they could adjudicate, yet they went on to give their opinions in the case, and, in so doing, thus committed, in my humble judgment, a triple error and injury—first, in giving any opinion at all in a case where they could decide nothing by it judicially; next, in giving an opinion too palpably wrong to admit of doubt or question; and, finally, in attempting, by that opinion, to reverse the high decision of the Executive in a national matter with which they had no right whatever to intermeddle.

Once for all, sir, let me here say—not, perhaps, to prevent, but to condemn beforehand, all misrepresentations of my sentiments on this subject—that I regard this transaction, the destruction of the Caroline, as a high-handed outrage, and among the very rankest of the many rank and gross outrages which have been committed, at sundry times, by the authority of Great Britain, in the name of that haughty nation. And in regard to the persons concerned in it, there was an apparent readiness and alacrity in them for this bloody business, which has aroused, and justly aroused, a sense of burning indignation towards them in the breast of every right-hearted American. The vainglorious boasting of McLeod is almost enough to make a Christian wish to give his offal to the dogs. Sir, the name of no man connected with this outrage can or ought to be mentioned, in any company where Americans are assembled, without all voices being raised in one common shout of execration. And I doubt not that, at this moment, the resolution lives and burns in a thousand patriot hearts to seek out, at any distance of time, on the very earliest *lawful* occasion, or single out in the first battle field in which they shall dare show themselves, every man, high or low, who is known to have had a part in that deed of butchery and blood, and immolate him to the manes of our murdered countrymen. What I want is, that they *should* wait for a *lawful* occasion.

Mr. Speaker, I cannot tell what is to be the end of the controversy between Great Britain and us. I trust that our Government will not suffer itself to be turned aside from its high duty by any collateral matter, but will keep England steadily to the great issue which it has tendered; and that, above all, it will yield nothing to any attempts, in whatever quarter made, to take the management of our foreign affairs and relations out of its hands.

In my opinion, New York has gone quite far enough, especially considering the political relation in which the authorities of the State stand to those of the United States, in thwarting the proper views and action of this Government in a matter of great national interest. Talk of Federal interference and State rights in New York! Sir, she has no inherent or other weakness to make it necessary for her to gasconade about State rights; she can afford to do her whole duty, as a member of the confederacy, towards the Federal Government; and, above all things, I want her to know that there is no harvest of glory left in all the broad field of nullification for her to reap.

Sir, this man McLeod ought to have been released by some appropriate pro-

ceeding in the courts without a trial. He should either have been discharged on *habeas corpus* or by a *nolle prosequi*, entered by the Attorney General, under the direction of the Governor, or he should have been let to bail on his own recognizance. But it seems he is to be put to his trial before a jury. Well, sir, he will be acquitted; admitting it proved that he was one of the party that attacked and destroyed the Caroline, he will be acquitted, and acquitted on the law of the case as I have here presented it. Sir, they might take a jury from Lockport, half of whom should be "sympathizers" or "patriots"—for I profess to know what honesty a Lockport jury is capable of, in times of the greatest excitement—I have tried them in such a time—and they might send Mr. Justice Cowen to preside at the trial, as another judge of the Supreme Court *was* sent to preside there on another occasion—the occasion to which I have just alluded—and he might appear there with this learned opinion of the whole bench to back him; and, my life for it, only let McLeod be faithfully defended, as he would be if he had the services of his present counsel, no such jury could be found that would pronounce him guilty. I know these people who compose the juries in our courts of law in New York; and, whatever others might do, they cannot be made deliberately to stain their hands and souls with the blood of any man, however odious, who is shown to be innocent of any *legal* offence, though they be offered all the securities and immunities for their own crime which the imposing forms of judicial proceedings can afford. The acquittal of McLeod will relieve the main issue between the two countries, in relation to the destruction of the Caroline, of a collateral matter, unhappily thrust into the case, and leave the American Government free and unembarrassed, to bring the dispute to a decision; so that if, after all proper and earnest endeavors to avoid the necessity, we shall be compelled to take up arms in the case, we shall go to war, not in defence of a judicial murder, as some would seem disposed to have us, but in vindication of the sovereignty, the independence, and honor of the country, against a great national wrong and injury, for which we could not obtain redress in any other way.